

90-680

Petition No. 90-499
Cross-Petition No. _____

Supreme Court, U.S.

FILED

OCT 22 1990

JOSEPH F. SPANOL, JR.
CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1990

ACMAT CORPORATION,

Petitioner/Cross-Respondent

v.

SCHOOL DISTRICT OF PHILADELPHIA,

Respondent/Cross-Petitioner

**CROSS-PETITION FOR A WRIT OF
CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE
THIRD CIRCUIT**

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The School District of

Philadelphia



QUESTION PRESENTED

1. Whether the District Court erred by awarding Acmat amounts for alleged extra work in the absence of school board approval as required by section 5-508 of the Pennsylvania Public School Code Of 1949 and the contracts between the parties.

PARTIES

The names of all parties to the proceeding in the court whose judgment is sought to be reviewed here appear in the caption of the case. Although Hughes Urethane Construction, Inc., is listed as a third-party defendant in the caption of the Court of Appeals' Judgment Order, it had been dismissed from the action. Hughes Urethane Construction, Inc. has no interest in the outcome of the petition and is not considered a party to this proceeding. There is no other party with an interest in the outcome of the petition.

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OPINIONS BELOW

The per curiam Judgment Order of the United States Court of Appeals for the Third Circuit, affirming the amended final judgment of the District Court, is officially reported as *Acmat Corporation v. School District of Philadelphia*, 904 F.2d 693 (3d Cir. 1990) and appears in Appendix A at 1a-2a.¹ The decision of the United States Court of Appeals for the Third Circuit, denying Acmat Corporation's ("Acmat") Petition for Rehearing, not officially reported, is printed in Appendix B at 3a-4a. The opinion and order of the United States District Court for the

1. Appendices A through J are attached to the Petition of ACMAT Corporation and are numbered sequentially throughout from 1a to 245a.

Eastern District of Pennsylvania deciding the summary judgment motion by the School District of Philadelphia ("School District"), not officially reported, is printed in Appendix C at 5a-24a.

JURISDICTION

The Judgment Order of the United States Court of Appeals is dated May 23, 1990. Acmat's Petition for Rehearing was denied by Order dated June 22, 1990. In accordance with Rule 12.3, this Cross-Petition is filed within 30 days of the receipt of Acmat's Petition for a Writ of Certiorari. Jurisdiction in this Court is invoked pursuant to 28 U.S.C. §1254. The School District received Acmat's Petition for Writ of Certiorari on September 21, 1990.

STATUTORY PROVISION INVOLVED

Section 5-508 of Pennsylvania Public School Code of 1949, 24 P.S. §5-508, provides:

§5-508. Majority vote required; recording The affirmative vote of a majority of all the members of the board of school directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on the following subjects:—

Fixing length of school term.

Adopting textbooks.

Appointing or dismissing district superintendents, assistant district superintendents, associate superintendents, principals, and teachers.

Appointing tax collectors and other appointees.

Adopting the annual budget.

Levying and assessing taxes.

Purchasing, selling or condemning land.

Locating new buildings or changing the locations of old ones.

Dismissing a teacher after a hearing.

Creating or increasing any indebtedness.

Adopting courses of study.

Establishing additional schools or departments.
Designating depositories for school funds.
Entering into contracts of any kind, including contracts for the purchase of fuel or any supplies, where the amount involved exceeds one hundred dollars (\$100).
Fixing salaries or compensation of officers, teachers, or other appointees of the board of school directors.
Entering into contracts with and making appropriations to the intermediate unit for the district's proportionate share of the cost of services provided or to be provided for by the intermediate unit.
Failure to comply with the provisions of this section shall render such acts of the board of school directors void and unenforceable.

STATEMENT OF THE CASE

A. Prior Proceedings

This is an action by Acmat to recover damages for alleged extra work Acmat contends it performed in connection with three asbestos removal contracts with the School District. Acmat commenced this action by Summons and Complaint in the United States District Court for the Eastern District of Pennsylvania on December 9, 1985. Acmat's negligence and Racketeer Influenced and Corrupt Organizations Act claims against the School District were later voluntarily dismissed with prejudice. Acmat's punitive damages and two fraud counts were withdrawn without prejudice.

Following the completion of discovery, the School District filed a Motion for Summary Judgment on each of Acmat's remaining claims. The School District argued, *inter alia*, that Acmat was prohibited from recovering on any contractual or quasi-contractual claims for alleged extra work because Acmat failed to obtain the approval of the School Board, as required under its contracts and under the provisions of the Pennsylvania Public School Code.

The District Court issued a twenty-two page Order in response to the School District's motion on December 21, 1988.

(App. C at 5a-25a). The District Court agreed with the School District that Acmat was required to seek and obtain the approval of the School Board in advance for any alleged extra work under its contracts with the School District. Notwithstanding this holding, however, the District Court proceeded to determine on an item-by-item basis whether Acmat was entitled to receive damages for individual items of alleged extra work. In a number of instances, the court held that Acmat was entitled to recover additional compensation from the School District for certain specific items of alleged extra work, in the absence of any formal School Board approval. At the conclusion of the Order, the District Court determined that Acmat was entitled to a total credit of \$205,723.79 for extra work against the School District's counterclaim. (App. C at 23a). This amount was later reduced to \$132,420.70 in the Amended Final Judgment. (App. F at 97a).

B. Statement Of Facts

In the spring of 1984, the School District entered into three separate written fixed-price contracts with Acmat for the removal of asbestos from three Philadelphia public schools, Fairhill, Lincoln and Rush. (App. E at 82a-96a). The contracts were duly approved by the Board of Education of the School District of Philadelphia.

Each contract included a section setting forth the manner in which the contract documents could be modified. The contracts provided that the School District could make changes in the drawings or specifications but mandated that any such changes would be subject to Board approval. (App. E at 90a-91a). These same procedures applied in those instances where a contractor claimed it had discovered site conditions differing from those shown in the contract drawings and specifications. The contracts further provided that they were being entered into subject to the provisions of the Pennsylvania Public School Code. (App. E at 85a).

The School Board approved the three fixed-price contracts for asbestos removal between the School District and Acmat. The School District and Acmat agreed, with Board approval, to

a single written change order for the work at the Fairhill School. The Board did not approve, nor did the School District ever issue, any change orders with respect to work at the Lincoln School. The parties agreed, with Board approval, to a single written change order at the Rush School. No other change orders or requests for additional compensation were approved by the School Board. The total fixed price for all three contracts was \$2,001,283. Acmat, however, subsequently sought nearly \$6,000,000 for alleged contract extras and modifications.

REASONS FOR GRANTING THE WRIT

A. The District Court Improperly Granted Damages To Acmat, Notwithstanding The Court's Holding That Board Approval Was Necessary For All Contract Modifications.

The District Court's award of damages to Acmat in the absence of School Board approval is directly at odds with the decision of the Pennsylvania Supreme Court in *Nether Providence Twp. School Auth. v. Thomas Durkin & Sons, Inc.*, 505 Pa. 42, 476 A.2d 904 (1984), and the provisions of the Pennsylvania Public School Code. *Durkin* and §5-508 of the Pennsylvania Public School Code both require formal School Board approval of any contracts or subsequent modifications to contracts entered into by school districts in Pennsylvania. The requirement of formal Board approval for all contracts and contract modifications is designed to protect public funds from subsequent claims by contractors for alleged extra work which was never properly authorized under the provisions of the Pennsylvania School Code. This compelling public interest, which has been supported for decades by the Pennsylvania courts and the Pennsylvania legislature, will effectively be frustrated if the District Court's award of damages to Acmat in the absence of formal Board approval is permitted to stand.

1. Public School Code Requirements.

In order to hold a school district liable under Pennsylvania law on a contractual understanding, the plaintiff must show that

the contract was supported by a formal resolution of a majority of school board members. Absent such a resolution, there is no enforceable contract. *The School Dist. of Phila. v. Framer Corp.*, 15 Pa. Commw. 621, 328 A.2d 866 (1974).

The School District of Philadelphia is a separate and independent school district administered, operated and managed by the Board of Education in accordance with state and local laws. The Pennsylvania School Code of 1949 provides, in pertinent part, that:

[t]he affirmative vote of a majority of all the members of the board of school directors in every school district, duly recorded, showing how each member voted, shall be required in order to take action on the following subjects:
. . . . Creating or increasing any indebtedness
Entering into contracts of any kind including contracts for the purchase of fuel or any supplies, where the amount involved exceeds One Hundred Dollars (\$100.00)
Failure to comply with the provisions of this section shall render such acts of the board of school directors void and unenforceable.

24 Pa. Stat. Ann. §5-508. Each of Acmat's contracts with the School District provided that it was entered into subject to the provisions of the Pennsylvania School Code of 1949. (App. E at 85a). Acmat bore the burden of establishing both the validity of the underlying contract as well as approval of the contract by a majority of board members. *Rudolph v. Albert Gallatin School Dist.*, 60 Pa. Commw. 456, 431 A.2d 1171 (1981).

Modifications to a contract likewise require approval by a majority of Board members. *Matevish v. Ramey Boro. School Dist.*, 167 Pa. Super. 313, 74 A.2d 797 (1950). In *Matevish*, the Court concluded no liability could be imposed upon the school district for any alleged oral modifications to the contract in the absence of School Board approval.

2. Contract Requirements.

Acmat's contracts with the School District also required Board approval of all contract modifications:

[t]he School District may . . . subject to *approval of the Board* . . . make changes in the . . . contract . . . such changes to be made in writing. If such changes cause an increase or decrease in the contractor's cost of, or time required for, performance of the contract, an equitable adjustment shall be made and the contractor notified in writing accordingly, any such change in the contract price being *subject to the approval of the Board*.

(App. E at 90a)(emphasis added).

The Pennsylvania Supreme Court has vigorously enforced the requirement of Board approval for all contracts and contract modifications. In *Durkin, supra*, a school authority entered into an agreement with a contractor to construct a new high school for a fixed price. After construction began, the contractor noticed discrepancies between the site plan topography contour lines and the actual topographical conditions. As a result, the contractor was required to perform additional work at the job site.

Before the job was completed, the parties disputed who would bear the cost of the additional work. The school authority's president authorized the school authority's secretary to write to the contractor to acknowledge the dispute and recommend that the contractor continue the work and hold the resolution of the disagreement in abeyance. After the job was completed, the contractor submitted a claim to the school authority for the extra work claiming that he had been induced to perform the work by the letter authorized by the school authority's president.

Recognizing the long line of Pennsylvania cases requiring strict adherence to the provisions of public contracts, the Pennsylvania Supreme Court denied these claims for additional compensation. The construction contracts in *Durkin* provided that "no change in the contract shall be made without the written approval of the Board." The Court, therefore, declined to allow the contractor to recover since written approval of the Board was never obtained. In so holding, the Court stated:

[w]e have always rigidly imposed strict standards on contractors who deal with public bodies to prevent the unwarranted plundering of public funds, to uphold the integrity of the bidding process, and we see no reason to change our long-established precedents today. We reiterate that public agreements can be altered only by the same formal municipal action that created them or express ratification by resolution of the public body.

505 Pa. at 48-49, 476 A.2d at 907.

The Court in *Durkin* rejected the contractor's claim that the school authority had waived the requirement that changes to the contract needed the approval of the Board. The Court held that the provision in a public contract relating to the manner in which changes to the contract can be made can be waived *only* by formal action of the Board or by express ratification of the extra work by resolution of the Board. The Court, therefore, held that the letter prepared by the school authority's president and secretary was not the act of the full Board and that the formal written action requirement for waiver had not been satisfied. The Court also observed that the Board had never adopted a resolution ratifying the extra work. Relying upon *Durkin*, the District Court here acknowledged that §5-508 of the Pennsylvania Public School Code requires formal Board approval of any alleged extra work. (App. C at 5a-6a).

Acmat did not allege that it had ever received formal Board approval for any of the items of extra work for which it was seeking additional compensation. The District Court did not find even a single instance of Board approval for alleged extra work in its Order of December 21, 1988. Based on the provisions of the Public School Code and the contracts between the parties, the District Court should have entered judgment in favor of the School District in response to each of Acmat's claims for alleged extra work.

Instead, the District Court awarded damages to Acmat in several instances based on written directions from employees of the School District that certain work was to be performed on a time and material basis. The District Court erred as a matter of

law in doing so. The Pennsylvania Supreme Court in *Durkin* held that the requirement of formal Board approval must be adhered to and can only be waived by formal Board resolution. Acmat never alleged any formal delegation of authority by the Board here, as no such authority existed. Acmat's contracts with the School District, furthermore, specifically provided that verbal instructions given by any of the officers, agents or employees of the Board which depart from contract documents "shall not be binding upon the Board." (App. E at 91a). Therefore, the District Court's award of damages to Acmat in the absence of Board approval was in error and must be reversed.

CONCLUSION

Based on the foregoing legal and factual arguments, it is respectfully requested that the School District of Philadelphia's Cross-Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit be granted.

Respectfully submitted,

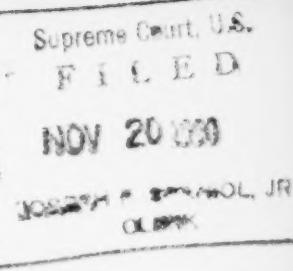


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Dated: October 22, 1990

(3) Petition No. 90-499
Cross-Petition No. 90-680 (7)



In The
Supreme Court of the United States

October Term, 1990

ACMAT CORPORATION,
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v.

SCHOOL DISTRICT OF PHILADELPHIA,
Respondent/Cross-Petitioner

**CROSS-RESPONDENT'S BRIEF IN RESPONSE
TO CROSS-PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT**

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OPINIONS BELOW

The per curiam judgment order of the United States Court of Appeals for the Third Circuit, affirming the amended final judgment of the district court, is officially reported as *Acmat Corporation v.*

School District of Philadelphia, 904 F.2d 693 (3rd Cir. 1990) and appears in Appendix ("App.") A at 1a-2a.¹ The decision of the United States Court of Appeals for the Third Circuit, denying Acmat Corporation's ("Acmat") Petition for Rehearing, not officially reported, is printed in App. B at 3a-4a. The opinion and order of the United States District Court for the Eastern District of Pennsylvania, deciding the summary judgment motion by the School District of Philadelphia ("School District"), not officially reported, is printed in App. C at 5a-24a. The district court's decision on Acmat's motion for reargument of the summary judgment motion was issued in open court, not officially reported, is printed in App. D at 51a-53a.

COUNTER-STATEMENT OF THE CASE

The Cross-Petition for a Writ of Certiorari highlights the importance of the issues raised in Acmat's Petition and emphasizes the need to grant both the Petition and Cross-Petition. The issue raised by the School District is whether the district court's order granting partial summary judgment, *sua sponte*, to Acmat² on a small number of claims, is contrary to state statutory law and the contract between the parties. Acmat's Petition for a Writ of Certiorari, bearing No. 90-499, seeks review of the entire judgment, including the decision denying Acmat a full and fair hearing on all of its claims by dismissing the great majority of Acmat's claims on the School District's motion for summary judgment, determining, *sua sponte*, the amount of damages to be awarded Acmat on

¹ Appendices A through J are attached to Acmat's Petition for a Writ of Certiorari, bearing No. 90-499. Appendices K through M are attached to Acmat's Reply Brief. Appendix N is attached hereto.

² Acmat's corporate parent, subsidiaries and affiliates are: Amins, Inc. Geremia Electric Co., Acmat of Texas, Inc., Acstar Holdings, Inc., United Coasts Corp., Acstar Insurance Co. and United Coastal Insurance Co.

summary judgment on a small number of claims and the failure to give Acmat a full and fair hearing on its claim for contract retainage. Acmat's Petition does not challenge the finding of liability against the School District on those few items where entitlement was found.

A. Statement of Facts

In or about April and June 1984, Acmat and the School District entered into separate contracts for asbestos abatement in three school buildings in the City of Philadelphia. All of the contracts were duly approved by the Board of Education of the School District of Philadelphia ("School Board").

Almost from the start, Acmat encountered conditions that differed materially from those shown on the plans and specifications for the projects and differed from those it observed in pre-bid inspections. Moreover, the School District breached the contracts in many respects. The School District unreasonably interfered with construction by permitting the premises to flood, conducting improper and late inspections, issuing defective plans and specifications and ordering work that caused disruptions. Other breaches involved a dispute over the scope of work required by the contracts. The foregoing resulted in enormous delays and the loss of millions of dollars by Acmat.

The contract provisions provide a mechanism for compensating the contractor for work unilaterally ordered by the School District and for differing site conditions. Parenthetically, the provision dealing with compensation for differing site conditions received School Board approval with the initial approval of the contracts and there is no additional approval required under the agreements for compensation on account of such conditions. Other claims, including those for breach of contract, were to be redressed in accordance with the common law. Most of the disputed work

performed by Acmat was authorized in writing or was verbally approved. This was well documented in the record and was admitted by counsel for the School District. App. N at 1a-5a.

B. Prior Proceedings

This action was commenced in 1985 with the filing of a complaint in the United States District Court for the Eastern District of Pennsylvania. Jurisdiction was based on diversity of citizenship. The complaint seeks damages for, *inter alia*, breach of contract, delays, differing site conditions and pleads a cause of action in quantum meruit.

In 1986 the district court directed Acmat to file a Statement of Claim. The School District filed a lengthy response acknowledging that additional work had been performed and assigning an amount therefor.

In 1988 the School District moved for summary judgment. Each of the parties was directed by the district court to file their statement with respect to those items of work authorized by the School District. The School District acknowledged that it authorized the performance of some work. The district court (Giles, J.) by order dated December 21, 1988, granted partial summary judgment to the School District. App. C at 5a-24a. The district court dismissed the claims for differing site conditions because of its erroneous determination that additional School Board approval was required for each such claim despite the School Board's initial approval of the contracts with a differing site condition clause by the School Board. Similarly, the claims for breach of contract were summarily dismissed on the grounds that there was no School Board approval for the additional labor and concomitant costs for work made more difficult and expensive by School District breaches.

The district court, *sua sponte*, found the School District liable to Acmat on a few claims because of the School District's acknowledgment of their validity. However, the district court, relying on certain contract language, restricted compensation for these claims primarily to that amount unilaterally determined by the School District, and further held that "..., the claims for time and material costs are not subject to judicial review." App. C at 9a.

The School District's counterclaims and Acmat's sole remaining claim for contract retainages were tried to a jury and culminated in an Amended Final Judgment dated October 24, 1989. App. F at 97a-98a. However, after trial, but before the Amended Final Judgment was entered, the district court entertained argument and thereafter reduced the amount previously awarded Acmat because the School District's expert re-evaluated the amounts it would have allowed Acmat. App. G at 99a-128a.

Acmat's appeal and the School District's cross-appeal were argued before the United States Court of Appeals for the Third Circuit. A Per Curiam Judgment Order, without any discussion of the case, affirming the judgment of the District Court is dated May 23, 1990. *Acmat Corporation v. School District of Philadelphia*, 904F.2d 693 (3rd Cir. 1990). App. A at 1a-2a. Acmat's Petition for Rehearing was denied by decision dated June 22, 1990. App. B at 3a-4a.

Acmat's Petition for a Writ of Certiorari was docketed in this Court in September 1990, and bears No. 90-499.

I. THE CROSS-PETITION REINFORCES THE IMPORTANCE OF GRANTING CERTIORARI TO REVIEW THE JUDGMENT OF THE LOWER COURT

Acmat acknowledges the significance of the issues raised in the School District's Cross-Petition and submits that it substantiates the

importance of granting review to both Acmat and the School District. An analysis of the lower court's decision on the School District's motion for summary judgment shows an inconsistent approach to the issues. The district court, on the one hand, dismissed the major part of Acmat's claim on the incorrect conclusion that it was based solely on "extra work" that was not approved by the School Board and, on the other hand, granted partial summary judgment to Acmat on a small number of so-called "extra work" items that also did not receive School Board approval. Although the great majority of Acmat's claims were not based on "extra work" or were differing site condition claims whose compensation was already approved in the contracts, the district court deprived Acmat of showing this to be the case by dismissing most of its case on summary judgment.

Accordingly, both Acmat's Petition for a Writ of Certiorari, bearing No. 90-499, and the School District's Cross-Petition should be granted to correct an illogical and inconsistent result that will have a far reaching negative effect on the construction industry. The School District takes the inconsistent position that it is entitled to certiorari, but that Acmat is not so entitled. The fact is that both parties seek certiorari because of the inconsistent decision of the district court that both granted and denied summary judgment on matters that were required to go to trial. The mere fact that the School District has sought certiorari lends support to Acmat's petition.

II. THE PARTIES SHOULD BE PERMITTED TO PROCEED TO TRIAL TO ADJUDICATE ACMAT'S CLAIMS

A. Acmat's claims do not involve "extra work" and are compensable without School Board approval.

Although the Petition and Cross-Petition show the importance of granting certiorari to review the judgment of the lower court,³ the School District erroneously suggests that reversal will result in dismissal of all of Acmat's claims. To the contrary, Acmat has demonstrated and will show if given the opportunity, that its claims are of the type that do not require School Board approval.

The district court even indicated at oral argument that it would have the power under *Derry Township School District v. Suburban Roofing Co., Inc.* 102 Pa. Commw. Ct. 54, 517 A. 2d 225 (1986), to find the School District liable. Moreover, the Pennsylvania courts recognize that claims for differing site conditions [*Teodori v. Penn Hills School District Authority*, 413 Pa. 127, 196 A.2d 306 (1964)], delay damages [*Coatesville Contractors & Engineers, Inc. v. Borough of Ridley Park*, 509 Pa. 553, 506 A. 2d 862 (1986)] and breach of contract [*Brinton v. School District of Shenango Township*, 81 Pa. Superior Ct. 450 (1923)], are separate and distinct from claims for extra work and are entitled to compensation even when claims for extra work are disallowed.⁴

³ Acmat seeks review of the entire judgment, including the adjudication of the School District's counterclaim.

⁴ Reliance by the School District on *Nether Providence Township School Authority v. Thomas M. Durkin & Sons, Inc.*, 505 Pa. 42, 476 A. 2d 904 (1984), is misplaced. The contract in *Durkin*, unlike the Acmat contracts, did not contain a differing site condition provision and its requirements for inspection were far more comprehensive than the inspection required of Acmat. Nor does *Durkin* have any bearing on Acmat's claims for breach of contract, delays and

Indeed, the School District acknowledged that much of the work that the district court awarded damages on would be compensable, except for its erroneous belief that School Board approval was required. See App. N at 1a-5a. Evidence of the School District's acknowledgment that additional work was performed can also be found in the School District's 1988 response to Acmat's Statement of Claim.

Accordingly, there is good and sufficient reason for this court to grant both the Petition and Cross-Petition in order to review the entire judgment of the lower court. Otherwise, the bad precedent set by this case shall have a deleterious impact on the entire construction industry doing business with the Commonwealth of Pennsylvania and its political subdivisions.

(fnt. 4 cont'd) quantum meruit recovery. In short, neither *Durkin* or the School Code has any application to the claims asserted by Acmat in the case at bar.

CONCLUSION

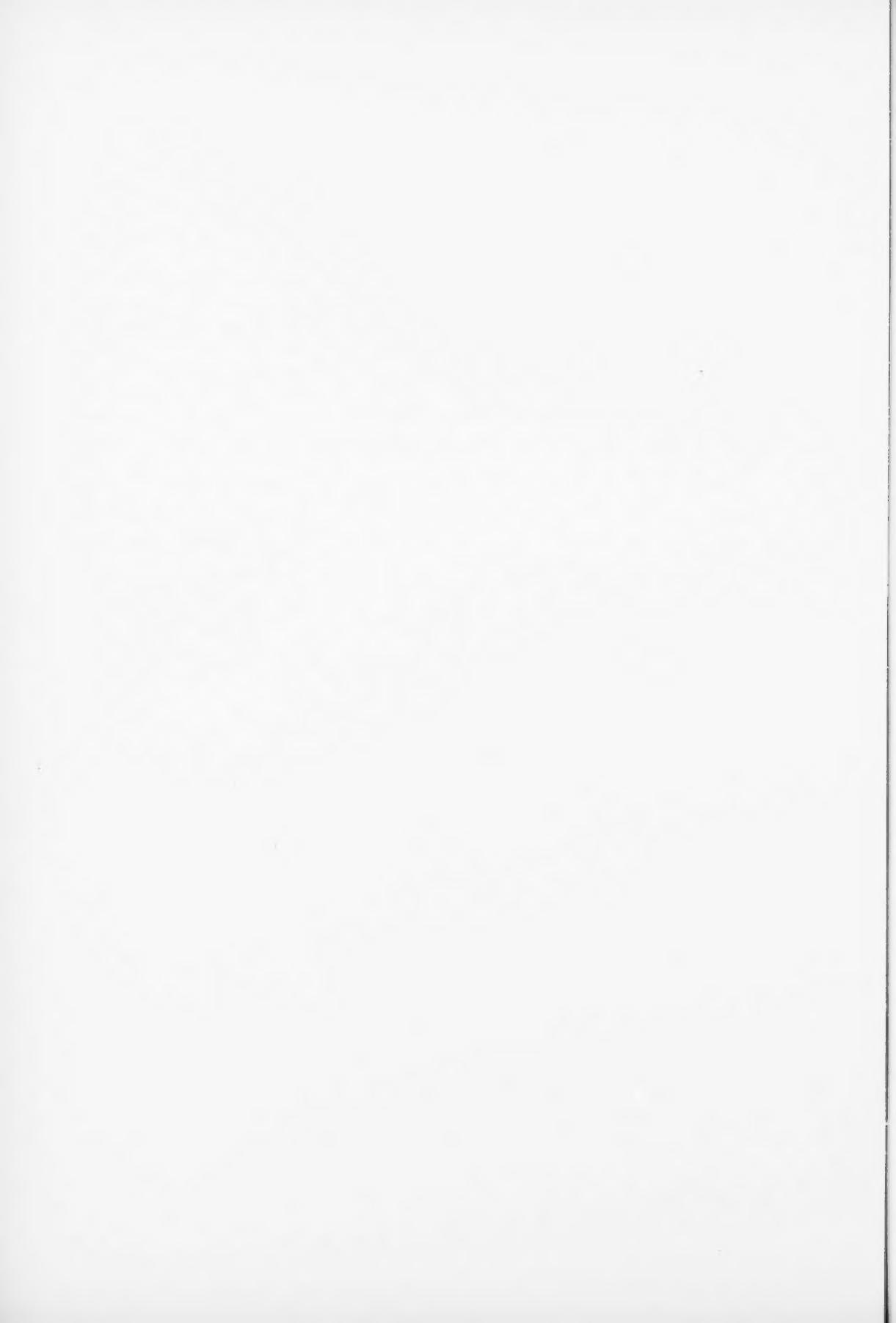
For these reasons, it is respectfully requested that the Petition and Cross-Petition for a Writ of Certiorari be granted.

Respectfully submitted,

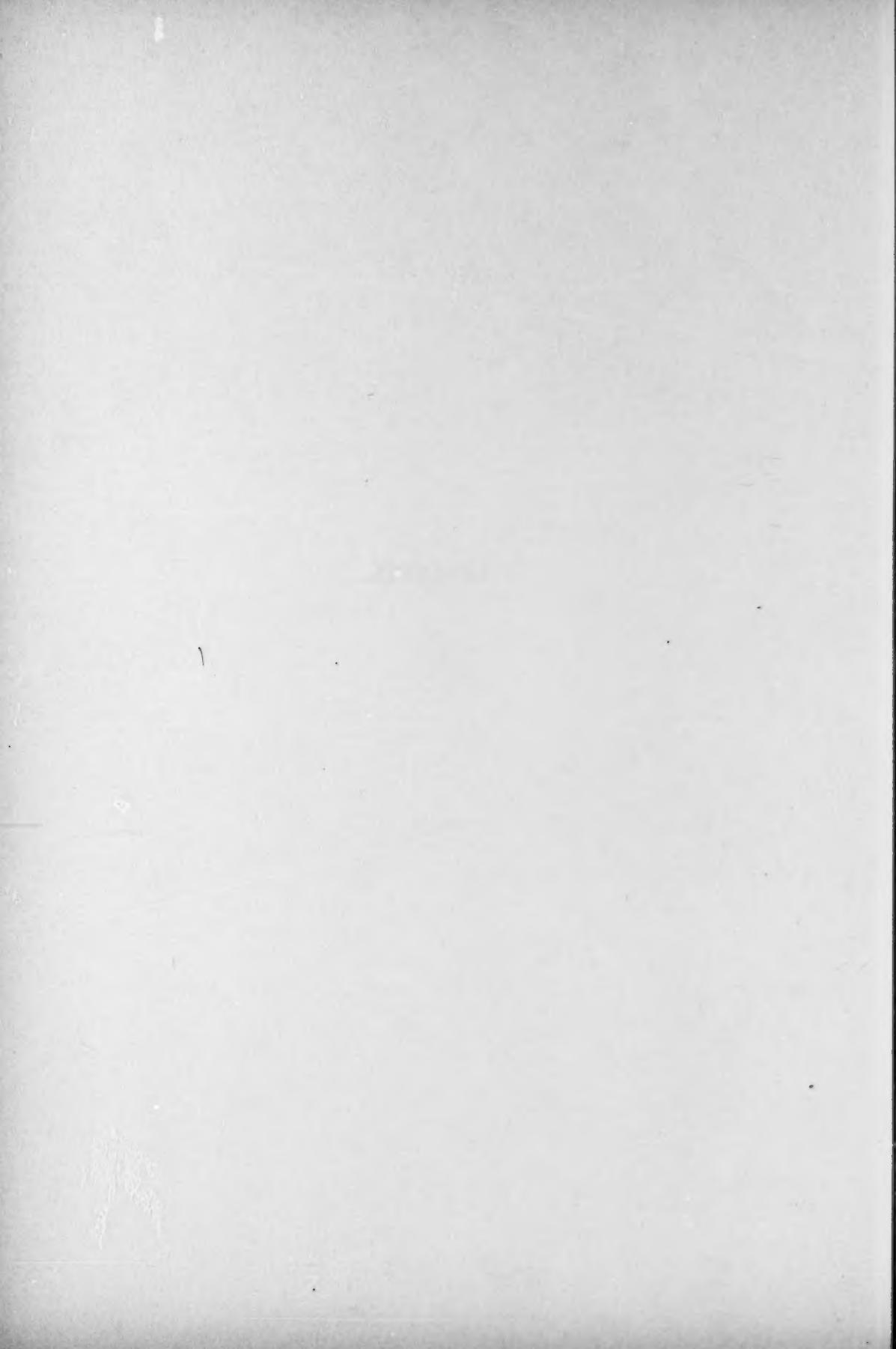
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Dated: November 15, 1990



APPENDIX



**APPENDIX N—EXCERPTS FROM TRANSCRIPT OF
ARGUMENT ON MOTIONS FOR SUMMARY
JUDGMENT ON OCTOBER 31, 1988**

In The

United States District Court

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

ACMAT

Plaintiff.

vs.

**PHILADELPHIA SCHOOL DISTRICT,
et al.**

Defendant.

Philadelphia, PA

October 31, 1988

9:05 a.m.

CA No. 85-7067

**TRANSCRIPT OF HEARING BEFORE THE HONORABLE
JAMES T. GILES UNITED STATES DISTRICT JUDGE**

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APPEARANCES:

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MR. DENNIS: If the School Board responds in a formal way to these claims, ACMAT's next intention is going to be that the School Board or the School District is not the final arbiter. That in

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some way that response is unreasonable and we're going to be right back in Court again with respect to the value of those claims. Indeed, it will argue at that point that there has been ratification with respect to the work. The question now only amounts to how much should ACMAT receive.

THE COURT: Well, I'm not concerned about the School Board action which ostensibly approved part of the ACMAT claim and disapproved part of it. That's not my concern. My concern is, any category of work that the School District agreed or represented it was going to pass on to the School Board for approval as extra work, but didn't for some reason. With respect to the Rush School and the other school, where there were partial approvals — approvals are part of the plan. One can infer the School District considered the entire claim and determined that only 'x' amount fairly represented extra work.

But if the School District has failed to pass on to the School Board a proposed change order or extra work order, isn't there a dispute as to what action the School Board would take on that which the School District had promised the contractor it would pass on at least for post work ratification?

MR. DENNIS: Your Honor? First, with respect to the authorizations or promises. Some are in writing. Some are oral. With further respect to that, Your Honor, even though these two were passed on and processed — the \$18,000 and the \$63,000 proposals — ACMAT is still unsatisfied. If I may, Your Honor. Also there are some that do not even merit being passed on. For example, the overspray point. Your Honor properly pointed out that there is a question of whether that's within the contract.

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THE COURT: The School District never represented, did it, that the overspray was an extra item?

MR. DENNIS: Not to my knowledge, Your Honor.

THE COURT: Okay. So, I'm only talking about that which the School District, in writing, said to the contractor, this is extra work. It's to be treated as extra work for purposes of the basic contract. Okay? We're going to pass this on to the School Board for approval to do the formal documentation, but we're requesting you, Contractor, in the meantime to go on with the work. Rely upon us to get approval from the School Board. Okay? And then the School District fails to pass on to the School Board for its post work ratification this category of work. Now, ACMAT says that there is such and I'm not sure what the School District position is. Is there any work that falls into that category?

MR. DENNIS: Yes, there is, Your Honor.

THE COURT: Well, what's the reason for the School District never passing on to the School Board for its post work ratification that which it agreed to pass on?

MR. DENNIS: There were delays occasioned by insufficient documentation. There were delays occasioned by the lack of personnel to process the change orders. And then, we were in litigation. And once litigation happened, according to the School District, there was really no need to proceed with that process because ACMAT had asserted a civil claim.

THE COURT: Well, you filed a motion for summary judgment. You made these assertions as to why certain claims were not passed on to the School Board. Not claims, but the addenda,

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were not passed on to the School Board for approval of this school. And you rely on the *Deery* case for the proposition that the contractor had proceeded at his own risk.

MR. DENNIS: Yes, sir.

THE COURT: This Court might have the power, even under *Deery*, to require the School District to do what it would have undertaken to do and that is to submit to the School Board for approval or disapproval what the School District had said it was going to pass on. Do you follow me?

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